BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
INTEREST OF *AMICI CURIAE*		1
INTRODUCTION AND SUMMARY OF ARGUMENT		3
ARGUMENT		6
I.	LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE SALARY BASIS REGULATIONS	6
	A. The Regulations Prohibit Only Actual Pay Deductions	6
	B. The Regulations Do Not Support a "Practical Matter" Test	13
II.	LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE FLSA	18
III.	THE REGULATORY PROHIBITION ON PARTIAL-WEEK SUSPENSION FOR VIOLATION OF WORKPLACE RULES IS IRRATIONAL AND CONTRARY TO THE FLSA	23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases:

Abshire v. Kern County, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) *passim*

Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) 17

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 18

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)..... 5,19

Carpenter v. City & County of Denver, Colorado, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. pending* (No. 95-2088)..... 12

Dole v. Malcolm Pirnie, Inc., 758 F.Supp. 899 (S.D.N.Y. 1991)..... 14

Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985)..... 4

Klein v. Rush-Presbyterian-St. Lukes Med. Ctr., 990 F.2d 279 (7th Cir. 1993) 17,22

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992).....12,14,21

Martin v. Monks, 1993 U.S. App. LEXIS 20610 (6th Cir. 1993) 14

McGuire v. City of Portland, Oregon, 91 F.3d 1293 (9th Cir. 1996) 22,23

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995) (Posner, J.), *pet. for cert. pending* (No. 95-586) 25

Reich v. Malcolm Pirnie, Inc., 821 F.Supp. 905 (S.D.N.Y. 1993)..... 5,21

Shalala v. Guernsey Memorial Hosp., 115 S.Ct. 1232 (1995)..... 15

Thomas Jefferson Univ. v. Shalala, 114 S.Ct. 2381 (1994).....15,16

Statutes and Regulations:

Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*.....*passim*

29 U.S.C. § 206(a)..... 18

29 U.S.C. § 207(a)..... 18

29 CFR § 541.1 6,18

29 CFR § 541.2..... 6,18

29 CFR § 541.3..... 6,18

29 CFR § 541.5d 7

29 CFR § 541.118(a) .....*passim*

48 CFR §§ 30.000 *et seq.* 21

48 CFR §§ 31.000 *et seq.* 21

48 CFR § 52.216-6..... 21

48 CFR § 52.216-17 21

Other Authority:

57 Fed. Reg. 37,666 (Aug. 19, 1992)..... 7

57 Fed. Reg. 37,676 (Aug. 19, 1992)..... 17

James S. Holt & Alan E. Simon, *The Private Sector Costs of the Department of Labor's Pay Docking Policy* (Employment Policy Foundation 1992) 5

Message from the President of the United States, H.R. Doc. No. 255, 75th Cong., 1st Sess. (May 24, 1937) 19

Opinion Letter of the Wage-Hour Administrator No. 1733, Lab. L. Rep. (CCH) ¶ 32,331 (April 15, 1994)..... 17

INTEREST OF *AMICI CURIAE**

The Chamber of Commerce of the United States of America ("Chamber") is a federation of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves representation of the interests of member-employers before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor and employment cases.

The Fair Labor Standards Act Reform Coalition ("Coalition") includes Aetna Life & Casualty Company, American International Group, Inc., American Consulting Engineers Council, American Institute of Certified Public Accountants, The Boeing Company, Buck Consultants, Computer Sciences Corporation, Deloitte & Touche L.L.P., Fireman's Fund Insurance Company, General Electric Company, IBM Corporation, Information Technology Association of America, John Alden Life

---

* The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk.

Insurance Company, Mutual of Omaha Insurance Company, National Technical Services Association, Newspaper Association of America, Northrop Grumman Corporation, Price Waterhouse L.L.P., Rockwell, and Tenneco Inc. Coalition members are, or represent, employers of large numbers of professional, executive, and administrative employees, who are exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). The Coalition represents the interests of its members before the courts, Congress, and the Department of Labor in an effort to preserve these exemptions where appropriate, as well as to reform them to reflect the realities of the modern workplace.

The Chamber and the Coalition file the present brief to urge rejection of an interpretation of the FLSA exemption for bona fide executive, administrative, and professional employees that has led to massive and unintended overtime liability among private sector employers. That interpretation would remove from the exemption entire classes of salaried employees because of the mere theoretical possibility that such employees could have their pay docked in violation of the Department of Labor's salary basis regulations. Classwide overtime backpay liability divorced from any actual pay deductions is inconsistent with salary basis regulations and with the FLSA itself.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords the Court an opportunity to put to an end an irrational interpretation of the FLSA exemption for bona fide executive, administrative, and professional employees. That interpretation has removed from the exemption the very employees it is meant to include. Department of Labor regulations establish as one requirement for exempt status the payment of employees on a "salary basis." Further regulations defining "salary basis" preclude an employer from, among other things, docking a salaried employee's wages for absences from work of less than a day. In a series of recent decisions, some federal courts—and, at times, the Department of Labor—have concluded that an employer's policy that might result in partial-day docking or other reductions in pay contrary to the "salary basis" requirements will result in loss of exempt status for *all* employees whose pay might have been docked pursuant to the policy, for the entire time the policy is in place, regardless of whether any affected employee actually suffered a loss of pay. This conclusion is contrary to the salary basis regulations, and contrary to the FLSA, which establish that exempt status under the Act is to be determined on an individual, week-to-week basis. The effect of an actual deduction in pay contrary to the salary basis regulations may be loss of exempt status for the affected employee during the week in which the deduction occurred, or it may be only that the employer must repay the employee for the deduction, but in no case is there any effect unless the employee actually suffers a reduction in pay.

This had been the understanding of "salary basis" among private employers for more than 40 years following the Department of Labor's initial promulgation of the salary basis requirement. As the petitioners note, there was "no controversy" about the salary basis test as late as 1986. Petrs'. Br. at 4 n.3. But in a series of cases beginning in the late 1980s—brought initially by public employees who became subject to the FLSA following this Court's decision in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)—courts began to hold that the mere existence of employee attendance and other disciplinary rules, even if rarely or never implemented, could result in loss of exempt status for entire classes of employees. The result has been an explosion of litigation[1] and massive retroactive overtime liability to highly-compensated executive, administrative, and professional employees who are not the intended beneficiaries of the FLSA.

Although these cases arose initially in response to accountability rules in public employment, a high percentage of the lawsuits that followed involved private employers. The real and potential effects of this expanded

---

[1] The seminal decision was *Abshire v. Kern County*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). In the 41 years between promulgation of the salary basis regulations and *Abshire*, only 123 federal court decisions discussed "salary basis" in the context of the FLSA, and many of those are from the late 1980s. In the 6 years since *Abshire*, there have been 161 such decisions. Search of Westlaw Federal Labor Law Database (Sept. 16, 1996).

FLSA liability in the private sector have been devastating. In one case alone, a private engineering and planning firm was made to pay more than $500,000 for two years of overtime backpay to a class of professional employees who had suffered either minimal partial-day pay deductions or, in most cases, none at all. *Reich v. Malcolm Pirnie, Inc.*, 821 F.Supp. 905, 910 (S.D.N.Y. 1993), *on remand from*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992). The estimated potential overtime backpay liability in the private sector from full enforcement of the newly expanded salary basis rule, as it applies only to partial-day docking, is nearly $39 billion. James S. Holt & Alan E. Simon, *The Private Sector Costs of the Department of Labor's Pay Docking Policy* (Employment Policy Foundation 1992). The results in recent salary basis lawsuits—including individual awards of tens of thousands of dollars in retroactive overtime payments to highly-trained professional and executive employees already earning incomes far above the national average—demonstrates in stark terms how far afield these courts have strayed from enforcing a statute designed to aid the "unprotected, unorganized and lowest paid of the nation's working population." *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945).

ARGUMENT

I. LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE SALARY BASIS REGULATIONS

A. The Regulations Prohibit Only Actual Pay Deductions

Following passage of the FLSA in 1938, the Department of Labor established the requirements for the Act's exemption of bona fide executive, administrative, and professional employees. The regulatory definitions rely primarily on the duties performed by such employees, but also require that these employees be paid "on a salary basis." 29 CFR §§ 541.1(f), 541.2(e), 541.3(e).

The regulations define "on a salary basis" in general terms in 29 CFR § 541.118(a). An employee is paid on a salary basis if pay is independent of the amount of work performed in any particular week. Subject to certain exceptions, "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 CFR § 541.118(a). A salaried employee is paid a fixed amount each week and is expected to work however long it takes (within reason) to get the job done.

Sections 541.118(a)(1) through (a)(5) establish specific additional rules employers must follow in paying exempt employees on a salary basis. *See* 29 CFR § 541.118(a)(1) (no partial-week deductions due to lack of available work for the employee); 541.118(a)(2) (no partial-

day deductions for absence from work for personal reasons);[2] 541.118(a)(3) (no partial-day deductions for absence from work due to sickness or disability); 541.118(a)(4) (no partial-week deductions for absence from work for jury duty, attendance as a witness, or temporary military leave); 541.118(a)(5) (no partial-week pay penalties for violation of workplace rules other than safety rules of major significance). Finally, section 541.118(a)(6) describes the consequences of failing to follow these rules. This regulatory provision establishes that failure to follow the (a)(1) through (a)(5) pay rules may result in loss of exempt status, but only for the employee whose pay is actually affected by the pay violation, and only for the weeks during which the violation occurs.

The specific regulatory rules in sections 541.118(a)(1) through (a)(5) allow certain partial-week and partial-day pay deductions for exempt employees, and disallow others. These regulations make a key distinction between loss of pay resulting from lack of work available for the employee and loss of pay resulting from the employee's absence from work or from disciplinary measures. When an employee is not paid during part of a

---

[2] In response to the uproar created by *Abshire* and its progeny, the Department of Labor in 1992 added a new 29 CFR § 541.5d that removes the partial-day docking rule from the salary basis test for public employers subject to public accountability rules. 57 Fed. Reg. 37,666 (Aug. 19, 1992). The partial-day docking rule remains in full force for private employers.

week because there is no work available, in violation of section 541.118(a)(1), the employer is tying the employee's pay to the amount of work performed (as opposed to time spent on the job, or compliance with workplace conduct rules), contrary to the basic definition of "salary basis." Accordingly, "[a]n employee will not be considered to be 'on a salary basis' if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business." 29 CFR § 541.118(a)(1). "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis." *Id.* at § 541.118(a)(6). The effect of such deductions is that "the exemption would not be applicable to [the employee] during the entire period when such deductions were being made." *Id.*

In contrast, pay deductions that violate one of the other section 541.118(a)(1) through (a)(5) pay deduction rules—deductions that are made for reasons other than lack of work—do not mandate loss of exempt status; section 541.118(a)(1) is the only one of the five pay deduction rules that specifies that the employee "will not considered to be 'on a salary basis'" if the employer makes a deduction contrary to the rule. Pay deductions in violation of sections 541.118(a)(2) through (a)(5) do not jeopardize the employee's salaried or exempt status if the employer eventually pays the money: "[W]here a deduction not permitted by these interpretations is inadvertent, *or is made for reasons other than lack of work*, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 CFR § 541.118(a)(6) (emphasis added).

This regulatory scheme is consistent with employers' traditional authority to control the on-the-job conduct of employees, including salaried employees. Employers retain the authority under the salary basis regulations to monitor conduct and demand attendance in the workplace from salaried employees. An employer could, consistent with the regulations, terminate or suspend (for a period of a week or more) a salaried employee who showed up for work only a few hours a day; "salary basis" does not mean that employees are completely free to come and go as they please. Salaried employees enjoy a degree of flexibility in their work hours, but an employer has an obligation to ensure a certain regularity in hours for the benefit of clients and customers and for the coordination of work between employees.[3] Similarly, the regulations allow an employer to punish safety and other workrule violations by salaried employees with termination or suspension for a period of a week or more.

---

[3] The AFL-CIO disagrees. In its *amicus* brief in this case, the AFL-CIO argues that an employer may not attempt to monitor or control the work hours of exempt employees: "Exempt employees manage themselves and others, they are not the managed." AFL-CIO Br. at 13. The AFL-CIO asks for nothing less than a revolution in wage-hour law. Employers routinely, and understandably, require some regularity of hours from managers and supervisors who exercise direct control over hourly workers. The AFL-CIO would eliminate exempt status for all of these executive and administrative employees because they are "managed" by more senior personnel.

Employee monitoring and control is consistent with exempt status, but the salary basis regulations require that such control not take certain forms. There may be no partial-day docking for absences from work, and no partial-week suspension for violation of minor safety rules, for example. In essence, sections 541.118(a)(2) through (a)(5) impose terms on the employment agreement between the employer and exempt employees. *See* 29 CFR § 541.118(a) (referring to the salaried employee's "employment agreement"). Violation of those terms does not render the employee nonexempt; it simply entitles the employee to compensation in accordance with the terms of the agreement. *See* 29 CFR § 541.118(a)(6) (the employer must reimburse the employee and promise to comply in the future).[4]

---

[4] The petitioners contend that the so-called "window of correction" under section 541.118(a)(6)—whereby an employer can repay deductions to an employee and promise future compliance—is available only to correct inadvertent deductions, and that all other deductions should result in loss of exempt status. This argument ignores the plain language of the regulatory provision, which allows correction where a deduction is "inadvertent, *or* is made for reasons other than lack of work." (emphasis added) The petitioners contend that allowing correction for noninadvertent partial-week disciplinary suspensions would permit the employer to violate the salary basis test "with impunity," knowing that correction can always be made later. Petrs'. Br. at 44. As *amici* have explained, however, the salary basis regulations

[Footnote continued on next page]

Under the plain terms of section 541.118(a)(6), pay deductions in violation of the salary basis rules may result either in loss of exempt status during the period of such deductions in those circumstances where it appears the employer did not intend to pay the employee on a salary basis (e.g., where deductions are made because there is no work for the employee), or may simply require the employer to pay back money owed to the employee and promise compliance in the future. In no case, however, is exempt status lost for salaried employees who have suffered no deduction in pay.

The petitioners, and the Department of Labor, have derived from the phrase "subject to" in section 541.118(a) a rule that an otherwise salaried employee may lose exempt status merely because of the *possibility* of deductions that are contrary to sections 541.118(a)(1) through (a)(5), even if no such deductions actually occur.[5] This reading is

---

[Footnote continued from previous page]

call for loss of exempt status only when deductions are made for lack of work. The other requirements, 541.118(a)(2) through (a)(5), are akin to required contractual provisions. Just as the party to any contract may breach "with impunity," as long as the other party receives its expectation measure of damages, so too can an employer make a (pointless) prohibited pay deduction for reasons other than lack of work, which it will then have to repay.

[5] Although the Department of Labor believes that loss of exempt status is not appropriate in this case, the rule the Department advocates would lead, and has led, in other cases

[Footnote continued on next page]

inconsistent with the structure of the regulations, and in particular with the language of section 541.118(a)(6), which describes the effects of violation of the rules. Section 541.118(a)(6) explains that, even in those cases in which an employer has violated section 541.118(a)(1) by docking pay for lack of work, and thereby has demonstrated the lack of intention to pay the employee on a salary basis, the effect is loss of exempt status only for the period during which such docking occurred and only for the employee whose pay was docked: "The effect of *making* [such] a deduction" is loss of the exemption "applicable to *him* during the entire period *when such deductions were being made.*" 29 CFR § 541.118(a)(6) (emphasis added). The petitioners and the Department of Labor, on the other hand, would read into the regulations an entirely inconsistent additional provision that the mere possibility of pay deductions for violations of the section 541.118(a)(2) through (a)(5) rules (violations the regulations do *not* define as indicative of a lack of intention to pay on a salary basis) can lead to loss of exempt status over a far longer period of time and for an entire class of employees. The regulations plainly will not support such an implied rule. In light of the language and structure of the

---

[Footnote continued from previous page]

to loss of exempt status for broad categories of executive, administrative, and professional employees who never suffered any pay deductions that violate the salary basis regulations. *E.g.*, *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Carpenter v. City & County of Denver, Colorado*, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. pending* (No. 95-2088).

salary basis regulations as a whole, and the emphasis of the FLSA on individualized week-to-week overtime determinations, *see infra* 18, the words "subject to" in section 541.118(a) will not carry the weight the petitioners and the Department of Labor put on them.

B. The Regulations Do Not Support a "Practical Matter" Test

The petitioners and the Department of Labor enunciate nearly identical salary basis rules, with different results. The petitioners contend that "[s]alaried status is absent whenever employees know that *as a practical matter* they are subject to disciplinary suspensions for a portion of their work period's compensation." Petrs'. Br. at 40 (emphasis added). According to the Department of Labor, "salaried status is lost under the regulations only when employees are 'subject to' such a disciplinary suspension *as a practical matter*." Br. for U.S. as Amicus Curiae on Pet. for Cert. at 10 (emphasis original). The petitioners and the Department of Labor nonetheless reach opposite conclusions as to whether the employees in this case lost their salaried status—strong evidence of the disutility of this "practical" test.

The petitioners do not explain the source of their "practical matter" rule. The Department of Labor relies for its present interpretation on the language in section 541.118(a)(6) that the effect of making a deduction not permitted under the regulations "will depend upon the facts in the particular case." The Department argues in effect that anything is possible "in a particular case," and therefore that the mere possibility of pay deductions not permitted by the regulations will support loss of exempt

status, and retroactive overtime liability, for a class of employees in the proper (practical) case.

Unfortunately, the Department has yet to make up its mind as to what its regulations mean, and employers are left without adequate guidance. The Department's current nuanced approach is in sharp contrast to its earlier position in such cases as *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992), and *Martin v. Monks*, 1993 U.S. App. LEXIS 20610 (6th Cir. 1993). As the petitioners have described, the Department of Labor argued to the courts in those cases that employees should lose exempt status in *all* cases in which an employer has a policy that might lead to partial-day deductions, regardless of deductions actually made: "[T]hat seldom, if ever, was the pay of the employees docked is not determinative of the issue presented. ... 'The dispositive factor is that under the policy, the employee's pay is at all times "subject to" deductions.'" Secretary of Labor's Brief in *Dole v. Malcolm Pirnie, Inc.*, 758 F.Supp. 899 (S.D.N.Y. 1991) at 20-21 (quoting *Abshire*, 908 F.2d at 487). *See also* Petrs'. Br. at 3a-5a (quoting similar language from the Secretary of Labor's briefs before other courts). Even this is a recent position. During the first 41 years of the salary basis regulations, prior to the Ninth Circuit's decision in *Abshire*, the Department of Labor had never argued that an employee could lose exempt status in the absence of actual pay docking.

The Department now has opted for an intermediate facts and circumstances approach under which an employer may be liable to employees who have suffered no deduction in pay, but where such liability will depend, among other things, on the number and type of employees covered by an

employer's policy that might lead to impermissible deductions, the number and instances of impermissible deductions, and the circumstances surrounding those deductions. Br. for U.S. as Amicus Curiae on Pet. for Cert. at 10. The Department of Labor thus has left itself, and the courts, complete discretion to impose liability on employers, and has left employers with almost no rules to guide their conduct.[6]

The Department's new interpretation, like its prior position that actual pay docking is irrelevant, is mistaken

---

[6] A majority of this Court, in two recent opinions, has indicated that agency interpretations are particularly suspect where, as here, they grant to the agency unbridled discretion to enforce the law as the agency sees fit in each case. *See Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2393 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor & Ginsburg, JJ.) ("[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law. ... An agency whose powers are not limited either by meaningful statutory standards or ... legislative rules poses a serious threat to liberty and to democracy.") (internal quotations omitted); *Shalala v. Guernsey Memorial Hosp.*, 115 S.Ct. 1232, 1241, 1244 (1995) (O'Connor, J., dissenting, joined by Scalia, Souter, and Thomas, JJ.) (Secretary of Health and Human Services required to promulgate regulations establishing default accounting principles, and be bound by them, rather than "circumvent the [regulatory] amendment process" by issuing only informal guidance).

and contrary to the regulatory language.[7] The language in section 541.118(a)(6) referring to the "facts in the particular case," upon which the Department of Labor relies, applies by its terms to those cases in which an employer has "ma[de] a deduction" not permitted by the regulations; it does not apply, as the Department would have it, to any case in which an employer *might* make a deduction. The "facts in the particular case" will determine whether the effect of such a deduction is loss of exempt status during the period of such deductions, or whether the employer may simply repay the amount deducted and promise future compliance. There is no option under section 541.118(a)(6) for a salaried employee to lose exempt status when the employee has never lost a penny of pay. There are no "facts in the particular case" of "making a deduction" if no deduction has been made.

The salary basis regulations, like the FLSA as a whole, are geared to *individual* determinations. The effect in a "particular case" of making deductions where no work

---

[7] The Department's latest interpretation of its regulations, such as it is, is entitled to little or no deference. While an agency's interpretation of its own regulations is generally to be followed unless "it is plainly erroneous or inconsistent with the regulation," substantially less deference is due when an agency has put forth inconsistent interpretations, as the Department of Labor has done with regard to section 541.118(a). *See Thomas Jefferson Univ.*, 114 S.Ct. at 2386, 2388. In any event, the Department's latest interpretation is plainly erroneous and inconsistent with the regulations.

is available is loss of exempt status "applicable to *him* [the individual employee] during the entire period when such deductions were being made." 29 CFR § 541.118(a)(6). The Department of Labor seeks to derive from a regulatory provision establishing that the effect of a deduction will depend on the facts of the *particular* case, a rule that an employer's policy that leads to no or few deductions can lead to loss of exempt status for a broad class of employees. This is not reliance on the facts of a particular case; it is lawless discretion.[8]

---

[8] Fear that any improper pay deduction may lead to retroactive overtime liability to an entire class of employees creates overdeterrence among employers. Some courts have suggested that an employer may violate the partial day docking rule of section 541.118(a)(2) by requiring employees to deduct time from their accrued *leave* for partial day absences, with no loss of pay. *Abshire*, 908 F.2d at 487 n.3; *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 990 F.2d 279, 284 (7th Cir. 1993). These dicta are almost certainly in error. *E.g., Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994); Opinion Letter of the Wage-Hour Administrator No. 1733, Lab. L. Rep. (CCH) ¶ 32,331 (April 15, 1994); 57 Fed. Reg. 37,676 (Aug. 19, 1992). But the mere possibility that a court might find even one such leave deduction unlawful, and thereby trigger classwide backpay, will motivate employers to restructure or eliminate leave policies that are otherwise beneficial for both employers and employees.

II. LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE FLSA

Even if the salary basis regulations could reasonably be read to support loss of exempt status for salaried employees who have never suffered loss of pay, as the petitioners and the Department of Labor argue, this Court would have to reject that interpretation of the regulations because it is contrary to the underlying statute.

The FLSA is designed to provide individualized relief from excessive work hours on a week-to-week basis to low-paid employees. "[T]he FLSA was designed to give specific minimum protections to *individual* workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (emphasis original). Both the minimum wage and maximum hour requirements of the statute apply per employee "workweek." 29 U.S.C. §§ 206(a), 207(a). Similarly, the exemption for bona fide executive, administrative, and professional employees—an exception to the minimum wage and maximum hour requirements—must be determined each week based on the specific functions performed and wages received by the employee in that week. *See* 29 CFR §§ 541.1(e), 541.2(d), 541.3(d), 541.118(a)(6). Yet the petitioners and the Department of Labor would hold employers liable for overtime compensation to otherwise exempt employees during any period of time the employer had a partial-day docking or workrule violation policy in place, regardless of whether the policy ever resulted in any deduction in pay from any of those employees during any of the time in question.

The FLSA is Depression-era legislation meant "to help those who toil in factory and on farm." Message from the President of the United States, H.R. Doc. No. 255, 75th Cong., 1st Sess. (May 24, 1937). It was designed to ensure a minimum wage and a reasonable workweek for those workers who do not have sufficient bargaining power to achieve fair working conditions. "[D]ue to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation." *Brooklyn Savings Bank*, 324 U.S. at 706. The Act exempts executive, administrative, and professional employees precisely because these skilled individuals have sufficient leverage and a sufficient level of responsibility that they do not need external protection from low wages and too much work. These employees are by definition *exempt* from FLSA overtime and minimum wage requirements, and their employers are free from the requirements of closely monitoring work hours and paying these employees one-and-a-half times their already high rate of pay for hours worked over 40 in a week. The petitioners' and Department of Labor's salary basis rules turn this statutory scheme on its head by creating a set of entitlements for these highly-paid employees under the aegis of the FLSA.

The FLSA gives to the Department of Labor the authority to promulgate regulations defining the executive, administrative, and professional employees who are exempt from the Act. The Department established as one requirement of exempt status payment of wages on a salary basis. The Department then further defined "salary basis" in section 541.118(a), including particular pay docking rules. The Department thereby created entitlements under

the authority of the FLSA—such as the prohibition on partial-day docking, the prohibition on partial-week suspension for violation of workplace rules other than major safety violations, and the payment of full salary during periods of jury duty—among the very executive, administrative, and professional employees who are supposed to be exempt from the requirements of the FLSA.

There is a strong argument that the creation of such regulatory protections for employees meant to be exempt from the Act is beyond the Department of Labor's statutory authority.[9] The petitioners and the Department of Labor have taken things a step further. They contend that the protections of nonexempt status under the FLSA should be extended to executive, administrative, and professional employees who have not even suffered the pay deductions the salary basis regulations prohibit. There is no statutory basis for such a conclusion. The FLSA's prohibitions on sweatshop conditions for unprotected workers will not

---

[9] *Amici* argue *infra* that the regulatory provision related to penalties for violation of workplace rules, section 541.118(a)(5), is irrational and inconsistent with the statute. It is possible to make similar arguments about other of the specific rules under sections 541.118(a)(2) through (a)(4). *Amici* do not press any of those broader arguments here, but do contend that *application* of rules, such as the prohibition on partial-day docking, to produce an overtime backpay windfall for highly-compensated executive, administrative, and professional employees who have never had their pay docked, is contrary to the statute.

support a rule that requires overtime payments to a highly-trained engineer who in theory *could* have pay docked for taking the afternoon off to attend a baseball game.

The irrational results that follow when courts accept the petitioners' rule is prima facie evidence that the rule is contrary to the FLSA. In *Malcolm Pirnie*, for example, the employer deducted a total of slightly over $3,000 from the pay of 24 employees for partial-day absences during a 19-month period. The employees were part of a class of "well-paid professionals," including "engineers, accountants, architects, scientists, supervisors and administrators" earning between $30,000 and $70,000 per year. 949 F.2d at 613. The employer subsequently changed its pay policy and reimbursed the 24 employees for all pay deductions. *After* the employer made such reimbursement, the Department of Labor sued the employer and eventually obtained judgment of over $500,000 in overtime backpay to be distributed to the entire class of professional employees. 821 F.Supp. at 910.[10]

---

[10] The original pay deductions in *Malcolm Pirnie*, like those of many private sector employers, were driven by government contracting rules that require contractors to keep meticulous record of time worked by an employee on the government project. *E.g.*, 48 CFR §§ 30.000 *et seq.*; 48 CFR §§ 31.000 *et seq.*; 48 CFR §§ 52.216-6, 52.216-17. The government will pay only for work actually performed. Private sector practices like that at issue in *Malcolm Pirnie* thus are motivated by essentially the same accountability principles

[Footnote continued on next page]

The employee/plaintiff in *Klein v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 990 F.2d 279 (7th Cir. 1993), a psychiatric nurse, had been suspended at least three times for serious patient safety violations, had been placed on a formal discipline plan for tardiness, and eventually was terminated for job performance and conduct problems. *Id.* at 281-82. Yet she was entitled to two years of overtime backpay because she was once suspended for one day without pay for "being rude, abrupt, and irritable to fellow staff members, as well as an incident with a patient's visitor." *Id.* at 282. The fact that Klein *could have been* suspended for a partial-week period for less than a serious health violation at any time during the two years was sufficient to entitle this disgruntled employee to her revenge against her former employer. *Id.*[11] To impose

---

[Footnote continued from previous page]

that created such turmoil in the public sector following *Abshire*.

11 Employers also can find themselves in a bind when a court concludes that disciplinary rules that have been collectively bargained, and therefore are not easily changed, run afoul of the salary basis requirements. The court in *McGuire v. City of Portland, Oregon*, 91 F.3d 1293 (9th Cir. 1996), affirmed summary judgment in favor of the overtime claims of former battalion chiefs for the Portland Fire Bureau because the City of Portland had a written disciplinary policy through which battalion chiefs could be suspended for less than a week for various workrule violations, even though no battalion chief had ever suffered such a suspension. *Id.* at 1294-95. The

[Footnote continued on next page]

liability against the employer in the present case would be no less capricious.

The FLSA mandates a return to a more rational understanding of the salary basis regulations that does not provide unintended overtime windfalls to broad classes of executive, administrative, and professional employees.

III. THE REGULATORY PROHIBITION ON PARTIAL-WEEK SUSPENSION FOR VIOLATION OF WORKPLACE RULES IS IRRATIONAL AND CONTRARY TO THE FLSA

Section 541.118(a)(5) of the salary basis regulations, which is applicable in this case, allows an employer to suspend a salaried employee for a period of less than a week for violation of a workplace rule only if the rule involves a safety standard of major significance. This regulatory provision, like the others under section 541.118(a), was promulgated pursuant to the Department of Labor's authority to define "bona fide executive, administrative, or professional capacity" under the FLSA. According to the petitioners, and to the Department as it

---

[Footnote continued from previous page]

disciplinary rules at issue had been collectively bargained. When the City attempted to change the rules to avoid FLSA liability, the same plaintiffs sued for violation of the collective bargaining agreement. *Id.* at 1296-97 (Skopil, J., concurring).

presently interprets its regulations, an assistant vice president of a large corporation who is suspended from work without pay for three days for making sexually offensive comments at an office meeting is not paid on a salary basis, and therefore is not an executive or administrative employee exempt from the FLSA.[12] Moreover, the assistant VP and every other executive and administrator in the corporation may lose exempt status and be eligible for overtime backpay, according to the petitioners and the Department of Labor, merely because the corporation has a handbook that prohibits sexually offensive comments in the workplace and *threatens* partial-week suspension for violations of the rule.

Section 541.118(a)(5) creates a further nonsensical rule. The regulation prohibits only suspensions of less than a week; an employer is free to suspend any employee for whole week periods, or terminate the employee, with no threat of loss of exempt status.[13] Thus, pursuant to the regulations, an employer can suspend a salaried employee for one day for violation of a *major* safety rule without loss

---

12 *Amici* believe that a proper reading of the salary basis regulations would require only that the employer in such a case pay the employee for the period of the suspension and promise not to suspend the employee again for less than a week. *See supra* 10 & n.4. Even under this scenario, the irrationality of the regulation is obvious.

13 *See* 29 CFR § 541.118(a) (salaried employee "need not be paid for any workweek in which he performs no work").

of exempt status, but must suspend the employee for at least a week or terminate the employee for violation of a *minor* safety or other workplace rule in order to protect the exemption.

There is no rational explanation for these results. An employer's decision to discipline an employee for violation of a workplace rule, and the form that discipline takes, is independent of the basis on which the employee is paid and even further removed from status as an executive, administrative, or professional employee. "How, it might be asked, does the structure of discipline affect the character of employees as hourly or salaried workers?" *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995) (Posner, J.), *pet. for cert. pending* (No. 95-586). The only answer the Seventh Circuit could derive is that "if an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." *Id.* The Seventh Circuit found this rationale "pretty feeble." *Id.* Irrational and contrary to the statute are other accurate descriptions.

The petitioners offer an equally preposterous explanation. According to the petitioners, exempt employees may not be disciplined at all: "The exempt are the disciplinarians; those subject to discipline are the non-exempt." Petrs'. Br. at 35. The petitioners thus envision a workplace in which all executive, administrative, and professional employees are free to do as they please, with no actual or threatened discipline from their employer: "the employee which [*sic*] an employer thinks of as potentially needing discipline could never be a true executive, exempt administrator or professional." *Id.* Even the petitioners have a tough time with this absurdity, appearing to concede

within a paragraph of their hassle-free workplace pronouncement that employers may impose on their exempt employees discipline other than partial-week suspensions. *Id.* at 34. But the petitioners offer no explanation why protection against this particular form of discipline should be a benchmark of exempt status.[14]

The Department of Labor has bestowed upon executive, administrative, and professional employees—who are to be exempt from the FLSA—freedom from workplace discipline that is not even enjoyed by the employees the Act is intended to protect. The Department has no such authority under the Act.

---

14 The petitioners cite evidence that in 1949 employers rarely imposed disciplinary deductions on executive, administrative, and professional employees. Petrs'. Br. at 34 n.29. No doubt there were many correlates of exempt status in 1949, such as being white and male, but such empirical observation can support a regulation only if, at a minimum, there is some rational connection between the observed fact and executive, administrative, or professional status, or at least a connection with payment on a salaried rather than hourly basis. Disciplinary suspension bears no relation to either.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eighth Circuit. The Court should hold: (1) that pay deductions in violation of the salary basis regulations may result in loss of exempt status only for employees whose pay has been docked and only for the weeks during which such deductions occurred; (2) that the window of correction under 29 CFR § 541.118(a)(6) is available when deductions are made inadvertently *or* for reasons other than lack of work; and (3) that the restriction on partial-week suspensions for workplace rule violations under 29 CFR § 541.118(a)(5) is irrational and invalid.

Respectfully submitted,

OF COUNSEL:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*WILLIAM J. KILBERG
DERRY DEAN SPARLIN, JR.
MARK SNYDERMAN
GIBSON, DUNN
& CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

**Counsel of Record*